Supreme Court, U.S.
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No. 98-1655

IN THE

Supreme Court of the United States

H. RICHARD AUSTIN,

Petitioner,

v.

HANOVER INSURANCE COMPANY and
MASSACHUSETTS BAY INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The petition correctly identifies the parties to the proceeding.

The following are parents of Respondent Hanover Insurance Company: Allmerica Financial Corporation, First Allmerica Financial Life Insurance Company, SMA Financial Corp. and Allmerica Property & Casualty Companies, Inc. Allmerica Financial Corporation is publicly traded on the New York Stock Exchange. There are no other publicly held corporations owning 10% or more of Hanover Insurance Company's stock.

The following are parents of Respondent Massachusetts Bay Insurance Company: Allmerica Financial Corporation, First Allmerica Financial Life Insurance Company, SMA Financial Corp., Allmerica Property & Casualty Companies, Inc. and Hanover Insurance Company. Allmerica Financial Corporation is publicly traded on the New York Stock Exchange. There are no other publicly held corporations owning 10% or more of Massachusetts Bay Insurance Company's stock.

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STATEMENT OF THE CASE

The *pro se* petition filed by H. Richard Austin is the final of repeated attempts by Mr. Austin to overturn the verdict of a Vermont jury concluding that he intentionally burned down his house and then made material misrepresentations about his resulting insurance claim to Respondents, Hanover Insurance Company and Massachusetts Bay Insurance Company.

Petitioner's petition follows: (1) partial summary judgment issued on March 17, 1997 by the United States District Court for the District of Vermont dismissing Mr. Austin's bad faith claims; (2) judgment as a matter of law entered by the United States District Court on July 29, 1997 at the close of Mr. Austin's evidence, dismissing his claims for intentional infliction of emotional distress and punitive damages; (3) jury verdict and final judgment against Mr. Austin entered by the United States District Court on August 1, 1997; (4) summary affirmance by the Second Circuit Court of Appeals on November 12, 1998; and (5) denial of Mr. Austin's Petition for Rehearing En Banc by the Second Circuit Court of Appeals on January 14, 1999.

As set forth below, there is no good basis for further judicial review of this matter. Petitioner continues to press discovery issues, evidentiary issues that he failed to preserve at trial and disagreements with the appropriateness of jury instructions under Vermont law. Most of these issues were found meritless and not warranting discussion by the Second Circuit. The remainder were dispensed with summarily. Significantly, while Petitioner raises various arguments directed to the finding that he intentionally set fire to his house, he raises no challenge to the independent jury verdict that he could not recover against Respondents because he made material misstatements of fact in connection with his insurance claim. While either ground supports judgment

against him, Petitioner now only challenges the finding of arson.

Petitioner's statement of facts is rife with misstatement. He claims that there was scant evidence of motive for an arson fire. Yet, the evidence showed that in just two years before the fire Mr. Austin accumulated $50,000 to $60,000 in credit card debt and sustained significant stock market losses. He also owed a divorce payment of $77,000 due one week before the fire. He had no income in this period. This financial crisis led Mr. Austin to borrow money from a relative, forge his deceased mother's signature on checks and use her credit cards to obtain illegal cash advances.

Petitioner claims that there was little evidence of opportunity. The trial evidence, however, showed that Mr. Austin could not substantiate his whereabouts after checking into a hotel the evening before the fire. Further, the evidence at trial showed that Mr. Austin left the hotel in the early morning hours, in plenty of time to return to his residence to start the fire.

Petitioner claims that most of the trial was preoccupied with the issue of fire causation. He fails to mention that a Vermont State Police officer at the fire scene noticed that Mr. Austin's car seemed heavily loaded down, and after inspecting the trunk found it tightly packed with business records, a personal computer, Mr. Austin's homeowner's insurance policy, photographs of the contents of his home, family heirlooms, religious objects and legal files pertaining to a petition for certiorari that Mr. Austin was readying to file with this Court in another case.[1] Mr. Austin removed all of these items from his residence shortly before the fire. His explanations for doing so were conflicting.

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1. *See Austin v. United Parcel Service*, 510 U.S. 1196 (mem.); *reh'g denied*, 511 U.S. 1152 (1994).

Petitioner claims that the testimony of Respondents' experts on fire cause and origin was contrived, false and fraudulent. He neglects to mention that he called no expert witnesses and that the Vermont State Police fire investigator who investigated this fire and the independent cause and origin experts retained by Respondents independently determined that this fire was incendiary. He neglects to mention that two positive samples of liquid accelerants were discovered within the first floor of the residence, and liquid pour patterns were found in this same area. He neglects to mention that a fuel-oil soaked *Wall Street Journal* matching these positive samples was discovered on the lawn outside his house and that the valves leading to his furnace had been manually turned prior to the fire.

Petitioner erroneously claims that he was not permitted adequate discovery, yet this case was filed in August 1994 and the discovery deadline was twice-extended at Austin's request until October 1, 1996, affording Mr. Austin over two years in which to prepare.

Petitioner claims that the United States District Court failed to exercise its "gate-keeping" role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but fails to mention that not once during the course of trial did he: (1) challenge the credentials or qualifications of Respondents' experts (two fire marshals, two independent cause and origin experts and one chemist); (2) object to the admission of the expert conclusions of these five witnesses; or (3) request to voir dire any of these experts. Furthermore, the scientific underpinning of the expert conclusion that this fire was incendiary was the subject of considerable, uncontradicted testimony.

REASONS FOR DENYING THE PETITION

There is no basis for review of this matter by this Court. The arguments raised by Petitioner to challenge the jury verdict against him concern principles long settled which were correctly applied by both the District Court and the Second Circuit. No conflict of authorities or conflict among the Circuits is alleged. No important constitutional issues are framed. Instead, the petition primarily seeks to overturn factual determinations by a Vermont jury and the District Court's rulings on various discovery and evidentiary matters, protected under an abuse of discretion standard.

I.

THERE IS NO SUGGESTION THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO FURTHER EXTEND THE ALREADY TWICE-EXTENDED DISCOVERY DEADLINE IN THIS CASE.

This case was filed in August 1994. Twice, Petitioner sought extensions of the discovery schedule set by the District Court, and twice those deadlines were extended, such that discovery closed more than two years after filing, on October 1, 1996. Petitioner's third request for an extension was denied. Fed. R. Civ. P. 16(b) contemplates a scheduling order setting discovery deadlines and imposes a "good cause" requirement for amendment. As there is no clear showing that the District Court abused its discretion by declining to further extend the deadline for completion of discovery, there is no error. *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992).

II.

PETITIONER WAIVED ANY *DAUBERT* CLAIM BY FAILING TO MAKE CONTEMPORANEOUS OBJECTION TO THE ADMISSION OF EXPERT TESTIMONY AT TRIAL.

Before trial, Petitioner filed a motion in limine seeking to exclude testimony by two of the five expert witnesses called at trial by Respondents. The District Court denied the motion, but granted Petitioner the right to raise any objections to expert testimony during trial. Despite this opportunity, Petitioner did not object once to the qualification of the four cause and origin experts and one chemist called by Respondents. Petitioner did not object once to any of the expert opinions offered by these experts. Petitioner did not request to voir dire these experts prior to testimony. The only objection Petitioner made was to one of the five witnesses (Thomas Norton), and that objection was not made until after Mr. Norton's testimony already was complete. This issue was not preserved by contemporaneous objection as required by Fed. R. Evid. 103(a)(1), and thus, absent plain error it is waived. *United States v. Coonan*, 938 F.2d 1553, 1564 (2d Cir. 1991), *cert. denied*, 502 U.S. 941 (1992).

III.

THE DISTRICT COURT'S ADMISSION OF EXPERT TESTIMONY ABOUT THE CAUSE AND ORIGIN OF THE FIRE WAS APPROPRIATE UNDER *DAUBERT*, *JOINER* AND *KUMHO TIRE*.

As noted, Petitioner did not make any contemporaneous objection to the qualifications, testimony or opinions of the five experts who collectively testified about the cause and origin of this fire and presence of accelerants. Accordingly, Petitioner waived appellate review, absent plain error.

Further, the decision by a District Court to admit expert testimony is subject to review only for abuse of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136, 138-39 (1997). The District Court also had broad latitude "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted. . . ." *Kumho Tire Co., Ltd. v. Carmichael*, 119 S. Ct. 1167, 1176 (1999).

The four cause and origin experts called by Respondents had, between themselves, investigated thousands of fires. Three of the four were certified fire investigators. Two of these experts, Stephen Houghton and David Harrington, testified at length about the scientific bases for cause and origin determinations, including the properties of ignitable liquids which produce distinctive "liquid pour patterns" of the type found at the Austin fire scene. Respondents' chemist testified as to gas chromatography/mass spectrometry analysis of fire debris samples and the *Wall Street Journal*, confirming the presence in each of an ignitable liquid in the kerosene range consistent with the fuel oil Mr. Austin stored in an underground tank on his property. Testimony of this type is offered in almost every civil or criminal arson case, and is neither novel nor controversial. Petitioner has shown no abuse of discretion by the District Court in allowing uncontradicted and unchallenged expert testimony on the cause and origin of this fire.

IV.

THE DISTRICT COURT DID NOT ERR IN REJECTING JURY INSTRUCTIONS PROPOSED BY PETITIONER THAT MISSTATED GOVERNING VERMONT LAW.

Petitioner continues to dispute the jury instructions given by the District Court, claiming that the Court should have

issued instructions: (a) importing criminal concepts of "probable cause" into this civil case; (b) mandating a presumption of innocence as to consideration of circumstantial evidence; and (c) directing the jury that Respondents had somehow "waived" their right to present evidence. None of these instructions is based on Vermont authority. The Second Circuit correctly concluded that: "Austin cannot prevail on his jury instruction claims because other language in the charge clarified the proper standard for an affirmative defense of arson and his proposed instruction on defendants' waiver of certain evidence has no basis in law." App. B. *See Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1992).

V.

THE DISTRICT COURT DID NOT ERR IN DENYING PETITIONER'S SUMMARY JUDGMENT MOTION AND IN GRANTING RESPONDENTS' CROSS MOTION FOR SUMMARY JUDGMENT ON BAD FAITH.

Petitioner argues that he was entitled to summary judgment in this matter and that the District Court erred by granting summary judgment for Respondents dismissing Mr. Austin's bad faith claims. As the Second Circuit pointed out, there were material factual issues precluding summary judgment for Petitioner on the issue of arson. Furthermore, in view of the evidence that this fire was incendiary and the evidence obtained by the Vermont State Police, the Second Circuit concluded that Mr. Austin could not have prevailed on this bad faith claim under the standards adopted by the Vermont Supreme Court in *Bushey v. Allstate Insurance Co.*, 164 Vt. 399, 402, 670 A.2d 807, 809 (1995). App. B. Petitioner also ignores the implications of having driven up to this incendiary fire scene with his car trunk loaded with business records, personal valuables, a computer, photographs of his possessions and his homeowner's insurance policy.

VI.

THE DISTRICT COURT DID NOT ERR IN DISMISSING PETITIONER'S CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND PUNITIVE DAMAGES AT THE CLOSE OF EVIDENCE.

Petitioner claims that the District Court erred in granting judgment as a matter of law on his claim of intentional infliction of emotional distress. However, he presented no evidence that he actually sustained extreme emotional distress as required by Vermont law, *see Sheltra v. Smith*, 136 Vt. 472, 476, 392 A.2d 431, 433 (1978). Similarly, he claims that the District Court erred in granting judgment as a matter of law on his punitive damages claim. Given the jury's determination that there was no liability, Petitioner's claim of error is moot.

VII.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO PERMIT PETITIONER TO AMEND HIS COMPLAINT FOUR DAYS BEFORE THE FINAL PRE-TRIAL CONFERENCE AND ON THE EVE OF TRIAL.

Undeterred by dismissal of his bad faith claims on summary judgment, Mr. Austin sought to resurrect these claims via amended pleading filed on the eve of trial and long after the motions deadline under the extended scheduling order had expired. The amendment was not only untimely but futile, as the amended pleading attempted to revive a bad faith claim already dismissed from this case on summary judgment. There was no abuse of discretion in denying this amendment. *Cruden v. Bank of New York*, 957 F 2d 961, 972 (2d Cir. 1992).

VIII.

THE DISTRICT COURT DID NOT ERR IN REFUSING TO RULE OR INSTRUCT THE JURY THAT RESPONDENTS HAD "INADVERTENTLY WAIVED" THEIR RIGHT TO PRESENT EVIDENCE AT TRIAL.

Championing a theory that at least must be credited as novel, Petitioner asserts that both the District Court and Second Circuit erred in not concluding that Respondents "inadvertently waived" and "surrendered" their right to present any evidence at trial. Petitioner claims also that the jury should have been instructed that due to "inadvertent waiver," Respondents had no right to present evidence at trial. Neither claim has any basis in Vermont law. *See KPC Corporation v. Book Press, Inc.*, 161 Vt. 145, 148, 636 A.2d. 326, 327 (1993) ("waiver is a voluntary relinquishment of a known right"). This issue, too, is wholly without merit.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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